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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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JOSE LUIS BANDA GUTIERREZ,

Petitioner,

v.

UNITED STATES

Respondent.

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On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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APPELLANT:
JOSE LUIS BANDA GUTIERREZ
#08008085
FCI BASTROP
P.O. BOX 730
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## QUESTIONS PRESENTED FOR REVIEW

A.

AN AFFIDAVIT FOR SEARCH WARRANT IS FAULTY WHERE NO FACTS ARE PRESENTED TO ESTABLISH THE VERACITY OR RELIABILITY OF AN INFORMANT SINCE THE INFORMATION PROVIDED MERELY CORROBORATES INNOCUOUS FACTS AND NO OTHER BASIS EXISTS FOR BELIEVING THAT THE INFORMANT'S ALLEGATIONS ARE TRUE

B.

THE DEEP COMMITMENT OUR CRIMINAL JUSTICE SYSTEM EXTENDS IN PROVIDING FUNDAMENTAL GUARANTEES ASSOCIATED WITH A JURY TRIAL ARE SUBVERTED WHEN A TRIAL REREADS TESTIMONY TO A JURY THAT WAS NOT SPECIFICALLY REQUESTED BY THE JURY DURING DELIBERATIONS

C.

THE PROOF NECESSARY TO INVOKE THE SEVERE PENALTIES OF 18 U.S.C. 924 SHOULD REQUIRE A SYMBIOTIC RELATIONSHIP BETWEEN THE FIREARM AND THE DRUG TRAFFICKING OFFENSE WHICH IS BASED ON ARTICULABLE FACTS RATHER THAN MERE SPECULATIONS THAT THE FIREARM COULD POSSIBLY HAVE BEEN USED IN RELATION TO THE DRUG OFFENSE

PARTIES TO PROCEEDING

PETITIONER: JOSE LUIS BANDA GUTIERREZ

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TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....ii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....2

JURISDICTION.....2

STATUTES INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING
THE PETITION.....12

CONCLUSION.....37

TABLE OF AUTHORITIES

**U.S. SUPREME COURT CASES**

Brinegar v. United States, 338 U.S. 160,
93 L.Ed.2d 1879, 69 S.Ct. 1302 (1949) .....13

Codispoti v. Pennsylvania, 418 U.S. 506,
41 L.Ed.2d 812, 94 S.Ct. 2687 (1974) .....16

Duncan v. Louisiana, 391 U.S. 145,
20 L.Ed.2d 491, 88 S.Ct. 1444 (1968) .....16

Franks v. Delaware, 438 U.S. 154,
57 L.Ed.2d 667, 98 S.Ct. 2674 (1978) .....14

Illinois v. Gates, 462 U.S. 214,
76 L.Ed.2d 527, 103 S.Ct. 2323, (1983) .....14

Turner v. Louisiana, 379 U.S. 466
13 L.Ed.2d 424, 85 S.Ct. 546 (1965) .....25

**U.S. COURTS OF APPEAL CASES**

Indiana Port Comm. v. Bethlehem Steel Corp., 27
835 F.2d 1207 (7th Cir.1982)

United States v. Angulo-Lopez,

791 F.2d 1394 (9th Cir.1986).....14

United States v. Barber,
594 F.2d 1244 (9th Cir. 1979).....30

United States v. Binder,

769 F.2d 595 (9th Cir. 1985).....17

United States v. Castillo
866 F.2d 1071 (9th Cir. 1988)..IBID

United States v. Guy,
924 F.2d 702 (7th Cir. 1992).....20, 21

United States v. Hunley,
567 F.2d 822 (8th Cir. 1977).....15

United States v. King,
552 F.2d 833 (9th Cir. 1976) cert denied
430 U.S. 966, 97 S.Ct. 1646,
52 L.Ed.2d 357 (1977).....16

United States v. La Guardia,
774 F.2d 317 (8th Cir. 1985)....34

United States v. Martinez,
967 F.2d 1343 (9th Cir. 1992)...26

United States v. Mason,
658 F.2d 1263 (9th Cir. 1981)...34

United States v. Nelson,
733 F.2d 364 (5th Cir. 1984).....28

United States v. Nolan,
700 F.2d 479 (9th Cir. 1983) cert denied
462 U.S. 1123, 103 S.Ct. 3095,
77 L.Ed.2d 1354 (1983).....17

United States v. Padin,
787 F.2d 1071 (6th Cir. 1986)...18

United States v. Ramos,
861 F.2d 228 (9th Cir. 1988)....34

United States v. Rawlings,
821 F.2d 1543 (11th Cir. 1987).27

United States v.Robertson,
706 F.2d 253 (8th Cir.1983).....34

United States v. Spach,
518 F.2d 866 (7th Cir. 1975).....15

United States v. Stewart,
779 F.2d 538 (9th Cir. 1985).....IBID

United States v. Wilson,
884 F.2d 174 (5th Cir. 1989).....IBID

**OTHER CASES**

People v. Gould,
237 Mich. 156, 211 N.W. 346 (1926).....32

Gittens v. Scully,
737 F.Supp. 840 (S.D. N.Y. 1990).....17

**CONSTITUTION**

United States Constitution
Fourth Amendment.....IBID

United States Constitution
Sixth Amendment.....IBID

**FEDERAL RULES**

FRAP 4(b).....12

FRCrP 23(a).....15

**UNITED STATES CODES**

18 U.S.C.3231.....11

18 U.S.C. 924(c).....IBID

21 U.S.C. 841(a)(1).....11

28 U.S.C. 1254.....2

28 U.S.C. 1291.....11

28 U.S.C. 1295(a)(2).....11

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# PETITION FOR WRIT OF CERTIORARI

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Petitioner, Jose Luis Banda Gutierrez, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 20, 1994.

## REFERENCE TO OFFICIAL AND UNOFFICIAL REPORT OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

United States v. Jose Luis Banda Gutierrez

United States Court of Appeals for the Ninth Circuit

No. 93-30215

CT/AG#: CR-92-2105-1-JLQ

Entered June 20, 1994

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 20, 1994. App. 1A. The Court has jurisdiction Pursuant to 28 U.S.C. § 1254 (1)

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

United States Constitution Fourth Amendment

United States Constitution Sixth Amendment

18 U.S.C. 3231

18 U.S.C. 924 (c)

21 U.S.C. 841(a) (1)

28 U.S.C. 1254 (1)

28 U.S.C. 1291

28 U.S.C. 1295(a)(2)

Federal Rule of Criminal Procedure 23 (a)

## STATEMENT OF THE CASE

This case spawned on or about November 4, 1992, following a short investigation conducted by Washington State law enforcement officers affiliated with the Yakima City/County Narcotics Unit (CCNU). The CCNU is a multi-agency law enforcement unit that is charged with investigating narcotic offenses in Yakima County, Washington.

On November 4, 1992, a Detective with the CCNU came into contact with Antonio Galvan at 4005 West Walnut in Yakima, Washington. The members of the CCNU executed a search warrant at

Mr. Galvan's home. The search resulted in the seizure of one-quarter ounce of cocaine and the arrest of Antonio Galvan. Mr. Galvan agreed to cooperate with the CCNU in exchange for leniency and placed a phone call to the source of his cocaine, a known narcotics trafficker, Anita Farias. Shortly thereafter, Mrs. Farias and her husband arrived at the Galvan residence with nine ounces of cocaine in their possession.

Mrs. Farias, and her husband, Manuel Farias, were placed under arrest inside the Galvan residence. At the time of her arrest, inside a home, Ms. Farias was extended an offer to cooperate with CCNU in exchange for leniency on her potential drug charges. Ms. Farias accepted the offer and proceeded to give the detectives a statement concerning her narcotics trafficking.

Based upon the information received from Anita Farias, the CCNU detectives sought and obtained a search warrant for 550 Chappel Road in Moxee, Washington. The Detective who submitted

the Affidavit for Search Warrant knew Anita Farias had previously been convicted of a drug felony.

The defendant argued to the lower courts that the affidavit for search warrant submitted to the State court judge failed to establish probable cause primarily because it contained no information from which to assess Anita Farias' reliability or veracity. Essentially, the affidavit set forth the following pertinent facts:

1. The execution of a search warrant on November 4, 1992, at 4005 West Walnut, resulted in the seizure of one-quarter ounce of cocaine and the arrest of Antonio Galvan.

2. Galvan agreed to cooperate with the CCNU in exchange for leniency.

3. Galvan placed a phone call to the source of his cocaine. Galvan received a call at 11:20 a.m. from a woman named Anna (subsequently identified as Anita Farias) who stated she was in Moxee, Washington, weighing out the cocaine, and would arrive in one-half hour.

4. Manuel and Anita Farias were arrested at 11:55 after arriving with a quarter kilo (9 ounces) of cocaine. Anita Farias agreed to cooperate in exchange for leniency.

5. Detective Gary Kouba accompanied Ms. Farias to Moxee to a home located at 550 Chappel Road in Moxee, Washington.[1]

6. Ms. Farias claimed she and her husband obtained the cocaine from Jose Banda. Farias stated she and her husband met Banda at 550 Chappel Road, and Banda followed them to the parking lot of Albertson's, where Banda provided them with the cocaine.

7. Farias stated Banda lived at 550 Chappel Road. She also stated 550 Chappel Road was her previous residence. The address for her vehicle registration displayed 550 Chappel Road.

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1 Moxee, Washington is located less than ten miles from Yakima, Washington.

8. Farias stated she previously saw multiple kilograms of cocaine delivered to 550 Chappel Road.

9. Officers observed a vehicle registered to Jose Luis Banda-Gutierrez parked at 550 Chappel Road.

Conspicuously absent from the affidavit, are facts addressing the veracity or reliability of the informant, Anita Farias, or her husband, Manuel. In fact, the affidavit revealed an investigation which only corroborated innocuous facts provided in Anita Farias' statements; i.e. she previously resided at 550 Chappel Road, and, as noted in the affidavit, her vehicle registration corroborated this fact. She also stated Banda resided at 550 Chappel Road, which was corroborated by other information in the affidavit that Banda's vehicle was registered to that address and was parked there.

Because information obtained in the investigation, as set forth in the affidavit, corroborated only two minor details of Anita Farias'

statements, the lack of evidence establishing her veracity is critical. It is for this reason that the defendant respectfully submits that the subsequent search warrant is invalid.

On November 4, 1992, a search warrant was issued for the premises at 550 Chappel Road in Moxee, Washington. Upon executing the warrant, law enforcement officers discovered a loaded 9 millimeter pistol, $14,780 in cash, a telephone paging device, 1000 grams of cocaine, and 690 grams of marijuana. When the officers entered the residence, no one threatened any of the officers with a gun, despite a 9mm firearm discovered under a sofa-seat cushion in the living room. There was never any testimony that the accused ever used a firearm at any time. There was never any indication from Anita Farias that Jose Luis Banda was armed, dangerous, or otherwise a violent person.

The following day, November 5, 1992, the officers obtained another search warrant for 550 Chappel Road. During the second search, the CCNU

team discovered 10 kilograms of cocaine hidden in a Ford Thunderbird, registered to Banda and parked in an attached garage. They also found over 3 kilograms of cocaine hidden in a shed on the property. The defendant was arrested on November 4, 1992. The case proceeded to trial.

During jury deliberations, the jury requested the court read a portion of a CCNU Detective's testimony concerning the location of the Thunderbird on November 4, 1992. At the direction of the court, the court reporter read the jury *extended* portions of Kouba's testimony. Approximately 25 minutes later, the jury returned guilty verdicts.

There were two key questions sent to the court while the jury deliberated. The relevant questions were: 1) Was the garage searched the first day, 11-4? Was the T-Bird in the garage 11-4? How was the garage secured 11-4. The defense requested that the court simply advise the jury that they need to rely upon their collective memories.

Over objection by the defense, the court advised the jury as follows: "In response to your two questions as to where certain evidence was found, you are instructed that you are required to rely upon your collective recollection as to the testimony. If you need to have a small portion of the testimony read back to you to clear up an item or two, I would consider such a request. We cannot read back a large portion of the testimony, however, I will consider a limited request. Please advise."

Shortly after responding to the jury, the court received yet another note specifically requesting- "Detective Kouba's testimony which states that the Ford Thunder bird [car] was in the garage on November 4, 1992."

The court's first inclination was to tell the jury that no such testimony exists. However, after the evening recess, the court decided to read back testimony which showed that there was no testimony concerning the T-Bird on the 4th, and, sua sponte, provided damaging testimony regarding the T-Bird

on November 5, 1992. Approximately 25 minutes after the testimony was read back to the jury, Mr. Banda was found guilty on all three remaining counts.

The court sentenced Banda to 193 months (16 years, 1 month) incarceration, to be followed by 5 years supervised release.

## BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The District Court has jurisdiction pursuant to 18 U.S.C. 3231 based on the charge that defendant violated 21 U.S.C. 841 (a)(1); 18 U.S.C. 924 (c).

The Ninth Circuit Court of Appeals has jurisdiction pursuant to 28 U.S.C. 1291.

The Judgment appealed from is an appealable order as defined in 28 U.S.C. 1295 (a)(2). The judgment is final and disposes of all claims with respect to all parties.

The entry of the District Court Judgment occurred on June 1, 1992 in the criminal docket.

The notice of Appeal was timely filed on June 3, 1993 in accordance with F.R.A.P. (4)(b).

## REASONS RELIED UPON FOR ISSUANCE OF WRIT

There are special and important reasons that this Writ should be granted. In particular, the lower courts decisions call for an exercise of this Court's power of supervision. In addition, the Court of Appeals decision for the Ninth Circuit affects federal questions concerning the lack of material corroboration of an informant in an affidavit for search warrant, the scope of a trial court's discretion in re-reading testimony to the jury during deliberations, and whether or not articulable facts must be presented to support a conviction for violation of 18 U.S.C. 924 (c), which have not been directly, but should be, settled by this Court. Finally, interests of justice compel this court to review and reverse the decisions of the lower courts.

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AN AFFIDAVIT FOR SEARCH WARRANT IS FAULTY WHERE NO FACTS ARE PRESENTED TO ESTABLISH THE VERACITY OR RELIABILITY OF AN INFORMANT SINCE THE INFORMATION PROVIDED MERELY CORROBORATES INNOCUOUS FACTS AND NO OTHER BASIS EXISTS FOR BELIEVING THAT THE INFORMANT'S ALLEGATIONS ARE TRUE

Throughout the history of the United States, the judiciary has been the prudent safeguard of our Fourth Amendment rights. Once again, it is called upon to protect our citizens. Aptly stated, Fourth Amendment rights "belong in the catalog of indispensable freedoms." Brinegar v. United States, 338 U.S. 160, 180-181 (1949) (dissenting opinion). As noted, "[a]mong deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart . . . [than the deprivation of the Fourth Amendment rights]." Id. Moreover, "since the officers are themselves the chief invaders, there is no enforcement outside the court." Id.

There is no dispute that, under the federal standard, in reviewing the sufficiency of probable

cause in an affidavit for search warrant, the "totality of circumstances" test is to be used by the district court. Illinois v. Gates, 462 U.S. 214 (1983). Under Illinois v. Gates, supra, the court looks to the totality of the circumstances to determine whether information provided by informants establishes probable cause. U.S. v. Angulo-Lopez, 791 F.2d 1394 (9th Cir. 1986). However, the district court's review of allegedly false statements is an independent determination, for the question turns on the consequences of a fraud on the issuing magistrate which that magistrate was not in a position to evaluate. See, Franks v. Delaware, 438 U.S. 154, 169-172 (1978).

Although a court is obliged to review the "totality of the circumstances" in determining whether or not probable cause existed for the issuance of the search warrant, some evidence bearing on reliability must be presented to the magistrate. See, Illinois v. Gates, 462 U.S. at 230 n. 6. Courts have held that a statement against penal

interest by the informant tends to show veracity. See, United States v. Hunley, 567 F.2d 822, 825 (8th Cir. 1977); United States v. Spach, 518 F.2d 866, 870 (7th Cir. 1975). Yet, in the case at bar, there is no dispute that Ms. Farias made no statement against penal interest when she decided to cooperate in exchange for leniency; e.g. that she was a partner with the individual she sought to implicate. In fact, there are no facts addressing the veracity or reliability of the informant, Anita Farias.

## THE DEEP COMMITMENT OUR CRIMINAL JUSTICE SYSTEM EXTENDS IN PROVIDING FUNDAMENTAL GUARANTEES ASSOCIATED WITH A JURY TRIAL ARE SUBVERTED WHEN A TRIAL COURT REREADS TESTIMONY TO A JURY THAT WAS NOT SPECIFICALLY REQUESTED BY THE JURY DURING DELIBERATIONS

A criminal defendant's right to have a jury decide his or her fate is the touchstone of our criminal justice system. The right to a jury trial is a right of constitutional magnitude, and provided for under Federal Rule of Criminal Procedure 23 (a).[2]

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2 In pertinent part, FRCrP 23 (a) provides;

The right to a jury trial reflects "a profound judgment about the way in which the law should be enforced and justice administered. A "right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." Duncan v. Louisiana, 391 U.S. 145, 155, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968) (footnote omitted). The Sixth Amendment to the United States Constitution represents a deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement. Codispoti v. Pennsylvania, 418 U.S. 506, 41 L.Ed.2d 812, 94 S.Ct. 2687 (1974).

The decision to re-read testimony to the jury during deliberations, or to refuse the same, typically has been held to be within the discretion of the district court. United States v. King, 552 F.2d 833, 850 (9th Cir. 1976) cert. denied, 430 U.S. 966, 97 S.Ct. 1646,

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Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

52 L.Ed.2d 357 (1977). However, a review of pertinent lower court case law indicates that the trial court must exercise great caution in responding to a jury's request during deliberations before re-reading testimony. See, Gittens v. Scully, 737 F.Supp. 840 (S.D. N.Y. 1990) (refusal by court to have portions of testimony read back to the jury was upheld as a proper exercise of discretion).

Reported decisions recognize two inherent dangers in re-reading testimony to a jury that is deliberating. First, undue emphasis may be accorded such testimony. United States v. Nolan, 700 F.2d 479, 486 (9th Cir. 1983) cert. denied, 462 U.S. 1123, 103 S.Ct. 3095, 77 L.Ed.2d 1354 (1983) (re-reading testimony is generally disfavored because of the undue emphasis it places on specific testimony and the delay which results); see also, United States v. Binder, 769 F.2d 595, 600 (9th Cir. 1985) (the court should avoid giving undue emphasis to particular testimony in deciding whether to allow a jury to be re-read trial testimony during deliberations). Yet, the lower courts remain

clouded as to whether a trial court may, sua sponte, provide the jury with testimony which is not specifically requested.

The second inherent danger in re-reading testimony to a jury that is deliberating is that it may be taken out of context by the jury. United States v. Padin, 787 F.2d 1071, 1076 (6th Cir. 1986).

In the case at bar, the jury was specific as to what testimony it was seeking: evidence pertaining to November 4, 1992. Yet, the trial court, acting without any clear precedent from this court, provided the jury with testimony that it, sub judice, deemed appropriate- disregarding the *specific* question asked by the jury. The cumulative effect of this was to deny the defendant a fair trial. The jury made a specific written request to hear a very specific portion of Detective Kouba's testimony concerning a car which was allegedly secured in a garage at 550 Chappel Road on November 4, 1992. The jury wanted to know if Detective Kouba had testified about the car in the garage on November 4, 1992.

Apparently, the jury believed that the existence or non-existence of this testimony was crucial for purposes of their deliberation process. This assumption is borne out by the fact that the jury returned its verdict of guilty approximately twenty to twenty-five minutes after testimony, which concerned November 5 and not November 4 as was requested, was read back to them.

In a similar case, contrary to the one before the bar, the Ninth Circuit upheld the trial court's decision to deny a jury's request to review specific testimony of a government witness. United States v. Castillo, 866 F.2d 1071 (9th Cir. 1988). In Castillo, supra, the jury requested a copy of a Detective's testimony regarding the size of the clothes in a closet. Specifically, the jury requested to know if the clothes were the defendant's size. Castillo, 866 F.2d at 1084. The defendant argued that the trial court erred in failing to respond to the jury's request to have the testimony read back during deliberations. Castillo, 866 F.2d at 1084. The Ninth Circuit held that the

district court had not abused its discretion in denying the jury's request. Id. The court reasoned that, "[r]eading of the witness' testimony would have placed undue emphasis on evidence previously presented to the jury." This court must send a clear message to the lower court's so they know precisely the scope of the discretion that the trial court's judge's have in deciding what should or should not be read back to a jury.

In another case, the Seventh Circuit upheld the trial court's decision not to respond to the jury request to re-listen to specific testimony of a government witness. United States v. Guy, 924 F.2d 702 (7th Cir. 1992). In Guy, supra, the defendant argued that the jury's request to have a copy of one witness' testimony indicated that they sought to have his story clear in their minds as they compared the testimony to that of other witnesses. Guy, 924 F.2d at 708.

The Seventh Circuit held that the district court did not abuse its discretion in denying the jury's

request for a copy of the transcript of a single witness during its deliberation process. United States v. Guy, 924 F.2d 702, 708 (7th Cir. 1992). The court reasoned:

> In considering the jury's request for a copy of McDaniel's testimony, the district court noted in the presence of counsel, that sending the testimony of one witness to the jury room would unduly highlight that testimony. The further noted ***that the length of the trial was short, and thus the jurors' memory of McDaniel's testimony should be sufficiently fresh***. . . . These concerns are legitimate reasons for the district court in its discretion to refuse the jury's request. (citation omitted) (emphasis added).

The same concerns the court expressed in Guy are present in the instant case. First, like Guy, the court allowed the jury to take notes throughout the course of this very short trial. Secondly, the defendant is concerned that the jury unduly highlighted the testimony of Detective Kouba. Thirdly, the length of the defendant's trial in this case was extremely short - actual testimony took less than one day to complete. This court should set precedent establishing that it is violative of a defendant's

constitutional right to a jury trial when testimony not specifically requested is re-read to a jury. This is especially true when trial courts allow the jury to take notes during the course of the trial as was done in the instant case.

There is no dispute that the requested testimony did not exist in the record. Detective Kouba's testimony concerning the car pertained exclusively to November 5, 1992. Despite the absence of the particular testimony sought by the jury, the district court allowed the jury to re-listen to that portion of Detective Kouba's testimony addressing November 5, 1992. For this reason, the defendant contends that when a trial court produces testimony beyond that which is specifically requested, a jury is unduly influenced on a material issue.

The government argued that since there are cases that stand for the court's authority to have testimony read to the jury and for the court's authority not to read prior testimony, then the court's decision in the present case to have testimony

read is proper. It is because of this lack of clarity on this limited issue that review is proper. The aforementioned analysis disregards the possibility that a court may abuse its discretion in allowing testimony to be read. In other words, it is not enough merely to say that since the court had discretion, then the court's actions are proper per se. The correct approach is to examine the context in which the court exercised its discretion once it receives proper guidance.

In this regard, the government submits that the court's decision to have portions of Detective Kouba's testimony read to the jury during deliberations did not place undue emphasis on specific testimony because the court balanced the jury's request by directing the court reporter to read to the jury all portions of the direct [by the Government] and the cross [by the Defendant] which pertained to the question posed by the jury. This balancing, however, does not resolve the specific concerns that the courts have experienced in specific cases. In fact,

the Ninth Circuit has recognized that reading a portion of the testimony can be damaging under certain circumstances. United States v. Castillo, 866 F.2d 1071 (9th Cir. 1988).

The Castillo case is an example of the kind of circumstances a court should review with great caution before allowing a jury to read a portion of the testimony. The circumstances that the court in Castillo make reference to are as follows: (1) The jury's question was specific and (2) the jury's question concerned the testimony of a single government witness. In the case at bar, these same circumstances exist. That is, the jury's question in the present case was quite specific and concerned the testimony one single government witness, Detective Kouba. As the court stated, in Castillo, allowing the jury to re-read a portion of the testimony under these type of circumstances improperly places undue emphasis on a piece of evidence. Re-reading a portion of testimony not specifically requested improperly places undue emphasis on evidence.

Reading back unrequested testimony denies accused individuals a fair trial because undue emphasis is placed on specific testimony and the limited testimony read is easily taken out of context even if a purported curative instruction is given.

The deep commitment our Nation cherishes in providing accused individuals with a jury to decide their fate, is chilled when a trial court re-reads testimony to a jury during the deliberation process that has not been specifically requested. As such, what happened in this case operated to subvert the basic guarantees of trial by jury. See generally, Turner v. Louisiana, 379 U.S. 466, 13 L.Ed.2d 424, 428-429, 85 S.Ct. 546, 549-550 (1965).

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## THE PROOF NECESSARY TO INVOKE THE SEVERE PENALTIES OF 18 U.S.C. § 924 SHOULD REQUIRE A SYMBIOTIC RELATIONSHIP BETWEEN THE FIREARM AND THE DRUG TRAFFICKING OFFENSE WHICH IS BASED ON ARTICULABLE FACTS RATHER THAN MERE SPECULATION THAT THE FIREARM COULD POSSIBLY HAVE BEEN USED IN RELATION TO THE DRUG OFFENSE

In order to sentence an individual for violation of 18 U.S.C. § 924(c), the Government must establish, by proof beyond a reasonable doubt, that the accused (1) knowingly used or carried a firearm (2) during and in relation to a drug-trafficking crime. United States v. Martinez, 967 F.2d 1343, 1346 (9th Cir. 1992).[3] The statute mandates a five year sentence for using or carrying a firearm during and in relation to any drug trafficking crime.

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3 The plain language of the statute evinces a congressional intent that the defendant must first "use or carry" the firearm in order to suffer the consequences of the five year mandatory sentence under the statute; not merely having constructive possession of the firearm as was the situation in the case at bar.

The Ninth Circuit Court of Appeals has indicated that the single purpose behind 18 U.S.C. § 924 (c) (1) is to impose more severe penalties where firearms actually or *potentially* facilitated the commission of a drug trafficking crime. U.S. v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985) (italic added) (opinion by J. Kennedy).

As in all cases of statutory interpretation, the starting point for analysis of section 924 (c)(1) is the plain language employed by Congress. [4] Congress stated, "Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm" [5] shall be subject to an additional five years of imprisonment. [6] Accordingly, the government must

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4 Indiana Port Comm. v. Bethlehem Steel Corp., 835 F.2d 1207, 1210 (7th Cir. 1982). See also United States v. Rawlings, 821 F.2d 1543 1545 (11th Cir. 1987) (When examining §924 (c) "we must assume that Congress used the words of the statute as they are commonly and ordinarily understood.")

5 18 USCA § 924 (c)(1).

6 Id.

establish a relationship between the firearm possessed by the defendant and the predicate drug trafficking offense.[7] This court must set precedent requiring a symbiotic relationship between the firearm and the alleged drug trafficking offense.

Prior to 1984, section 924 (c) made it an offense to "carry a firearm unlawfully during the commission of a felony". 18 U.S.C. 924 (c) (1) (2) (1984). In United States v. Nelson,[8] the Fifth Circuit held that a conviction under the pre-1984 version of section 924 (c) required that the government prove the defendant "knowingly carried a firearm . . ."[9] The requirement that there be a relationship between the weapon and the predicate crime existed prior to the 1984 amendment because the statute originally applied to a limited

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7 Wilson, 884 F.2d at 177.

8 733 F.2d 364, 370-71 (5th Cir. 1984).

9 Nelson, 733 F.2d at 370-71.

class of persons - those persons who carried firearms unlawfully while they engaged in felonies.[10]

Supreme Court Justice Anthony Kennedy, then a judge on the Ninth Circuit Court of Appeals, concluded in United States v. Stewart, infra, that when Congress deleted the limitation that the firearm be carried unlawfully it added the phrase "in relation to" in order to limit the element of "during". 779 F.2d 538 (9th Cir. 1985). In reaching this conclusion, Justice Kennedy emphasized the Senate report expressly noting significant changes resulting from the 1984 amendments, such as expansion of the statute's reach to "crimes of violence." Id. at 540.

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10 Stewart, 779 F.2d at 539 (opinion by J. Kennedy). Though the Legislative history does not say so expressly, it strongly implies that the "in relation to" language did not alter the scope of the statute, explaining that "the [original] section was directed at persons who chose to carry a firearm as an offensive weapon for a specific criminal act." Id. at 539-40 quoting S. Rep. No. 98-225 at 314 n. 10.

The legislative history of the 1984 amendment indicates that the "in relation to" language was not intended to create an element of the crime that did not previously exist. [11] The general rule of construction of a criminal statute provides that where a statute does not specify a heightened mental element, such as specific intent, general intent is presumed to be the required element. [12] The 1984 addition of the "in relation to" language was intended to explicitly allay the concern that a person could be prosecuted under section 924 (c) for committing an entirely unrelated crime while in possession of a firearm. Yet, the lower court decisions allow for the imposition of the severe sentence five year sentence enhancement under 924 (c) where, as in the case at bar, the accused

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11 Stewart, 779 F.2d at 539 (opinion by J. Kennedy), citing S. Rep. No 98-1225 at 314 n.

12 Id. See also Wilson , 884 F.2d at 178-9; United States v. Nelson, 733 F.2d 364, 370-71 (5th Cir. 1984); United States v. Barber, 594 F.2d 1244 (9th Cir. 1979)

is merely in constructive possession of a firearm and no testimony was presented the defendant ever even displayed the firearm.

Congress indicated that the firearm's use or possession be "in relation to" the crime should preclude the application of section 924 (c) (1) to a situation where the firearm's presence played no part in the crime, such as a gun carried in a pocket and never displayed, or referred to in the course of a pugilistic barroom fight. [13] Or, as exists in the case at bar, where a gun is found under a sofa cushion and no evidence was presented claiming that the defendant ever previously displayed a firearm. Yet, the lower court decisions do not require such a finding. Hence, the necessity for this court to intervene and provide the much needed guidance for the courts below.

Section 924 (c)(1) does not explicitly use terms such as "knowingly" or "willfully," the scienter language generally found in statutes creating specific

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13 S. Rep. No. 98-225 at 314 n. 10.

intent offenses. [14] It appears that Congress merely intended to emphasize a condition already implicit in the statute: that there be a relationship between the weapon and the predicate crime of drug trafficking. [15]

The 1986 amendment added "drug trafficking crime" to "any crime of violence" language. 18 U.S.C.A. 924 (c) (1) (West Supp. 1991). The statute now makes it an offense "during or in relation to any . . . drug trafficking crime" to use or carry a firearm.

When the statute was rewritten, the term "unlawfully" was eliminated, and the phrase "in relation to" was added. The current language of section 924 (c) (1) was added to the statute by amendment in 1986 as part of the Firearms Owners' Protection Act. 18 U.S. C. 924 (c) (1), (1986).

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14 Wilson, 884 F.2d at 178. Scienter is used to signify a defendant's guilty knowledge. People v. Gould, 237 Mich 156, 211 N.W. 346, 348 (1926)

15 Brown, 915 F.2d at 224.

When Congress revamped section 924 (c) by substituting the phrase "during and in relation to" and eliminating the requirement that the firearm be carried unlawfully, it sought to preclude the section application to situations "where a weapon's presence "played no part in the crime".[16] The weapon in this case played no part in the crime. This court must send the message to the lower courts that, absent clear articulable facts, and not mere speculation, convictions for 924 (c) will not stand.

The purpose of the amendments to section 924 (c) was to impose harsher sanctions "where firearms facilitated, or had the potential of facilitating, the commission of a felony," and more specifically, the commission of a drug trafficking

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16 United States v. Wilson, 884 F.2d 174 , 176-77 (5th Cir 1989) citing continuing Appropriations, 1985 -- comprehensive crime Control Act of 1984, S. Rep No. 98-225, 98th Cong. 2d (*1984) Sess 314 n.10 (1983), reprinted in US Code Cong. & Admin News 3182 3942 n.10.

crime. Id. See, United States v. LaGuardia, 774 F.2d 317, 321 (8th Cir. 1985); United States v. Mason, 658 F.2d 1263, 1271 (9th Cir. 1981). The statute necessarily implies some relation or connecting between the underlying criminal act of drug trafficking and the use or possession of the firearm. See also, United States v. Robertson, 706 F.2d 253, 256 (8th Cir. 1983). Although Congress did not intend that the statute be given a cramped reading, still, however broadly the terms may be construed, section 924 (c)(1) will not support a conviction for mere possession of a firearm during the course of criminal conduct. Brown, 915 F.2d at 224.

The "in relation to" language connotes a causal connection between the defendant's drug trafficking crime and the firearm. Ramos, 861 F.2d at 231. The connection must be supported by ample evidence to permit an inference that the defendant carried the weapon "in relation to" the drug offense. Id. at 230-231. The government has the burden of establishing some relationship between the firearm

the defendant possessed and the predicate drug trafficking offense. The 'in relation to' language implies a causal connection between a [defendant's] narcotics felonies and this firearm. This Court should send a message that a symbiotic relationship must clearly be present in all cases.

More than strategic proximity of drugs and firearms must be necessary for a conviction under section 924(c) (1). Supposedly, the mere presence of a firearm is insufficient to trigger criminal liability under section 924 (c) (1). The relationship between a firearm and the underlying offense is an essential element of the crime. The phrase "in relation to" should be construed to modify the "during" element, and although the "in relation to" language does not add a substantive element, or make section 924(c)(1) a specific intent offense, it alters the nature of the proof required to secure a conviction.

While the phrase "in relation to" does not create a separate substantive element, it nevertheless modifies the "during" element of section 924(c)(1),

and requires that a court explain that a **relational connection** is required for there to be a conviction.

The present version of section 924(c)(1) imposes severe sanctions, in the form of a five year, non-parolable sentence, where a firearm facilitated or had the potential of facilitating the commission of a drug trafficking crime. Section 924(c)(1) should not apply when one merely possesses a firearm during the commission of a drug trafficking crime. The government must prove beyond a reasonable doubt that the firearm was carried in relation to the underlying drug offense. This should not be accomplished by merely allowing the jury to speculate as to the possible or potential use of the firearm. There must be substantial evidence that the firearm discovered was actually related or otherwise directly connected to the drug-trafficking crime.

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## CONCLUSION

The petition for a writ of certiorari should be granted on each of the aforementioned questions presented.

Respectfully submitted,

Jose Luis Banda Gutierrez

# APPENDIX

Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. 3231 District Courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

18 U.S.C. 924 (c) (1), Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short barreled rifle, short barreled shotgun to imprisonment for ten years, and if the firearm is a machine-gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine-gun or destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person

convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

21 U.S.C. 841. Prohibited Acts A

(a) Excepts as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving-

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(II) cocaine such person shall be sentences to a term of imprisonment which may not be less than 10 years.

(B) In the case of a violation of subsection (a) of this section involving--

(ii) 500 grams or more of a mixture or substance containing a detectable amount of --

(II) cocaine such person shall be sentenced to a term of imprisonment which may not be less than 5 years.

28 U.S.C. 1254 (1) Courts of Appeals; certiorari;

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S.C. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decision of the district courts of the United States.

28 U.S.C. 1295 (a) (2)

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction;

(2) of an appeal from a final decision of a district court of the United States.

F.R.A.P. 4 (b)

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| UNITED STATES OF AMERICA, | ) NO. 93-30215 |
| | ) |
| Plaintiff-Appellee, | ) D.C. CR No. |
| | ) 92-2105-1-JLQ |
| v. | ) |
| | ) |
| JOSE LUIS BANDA-GUTIERREZ, | ) |
| | ) MEMO* |
| Defendant-Appellant. | ) |
| | ) |
| | ) |

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit Rule 36-3.

Submitted June 6, 1994**
Seattle, Washington

Before: WRIGHT, WIGGINS and THOMPSON, Circuit Judges.

## OVERVIEW

Jose Luis Banda-Gutierrez (Banda) appeals his jury conviction for possession of controlled substances with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); and possession of a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). He argues the affidavit supporting the government's search warrants did not establish probable cause, the warrants were overly broad, the trial court erroneously read back testimony to the jury, the jury was prejudiced by allegations Banda used a minor in a narcotics transaction, and there was insufficient evidence to support a finding he possessed either a firearm in relation to a drug transaction or marijuana with intent to distribute. We affirm.

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** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

## FACTS

On November 4, 1992, in response to an affidavit furnished by Detective Gary Kouba, a search warrant was issued for the premises at 550 Chappel Road in Moxee, Washington, Banda's residence. Upon executing the warrant, law enforcement officers discovered Banda and a minor in the residence, as well as a loaded 9 millimeter pistol, $14,780 in cash, a telephone paging device, 1000 grams of cocaine, and 690 grams of marijuana.

The following day, November 5, 1992, the officers obtained another search warrant for 550 Chappel Road. They discovered 10 kilograms of cocaine hidden in a Ford Thunderbird, registered to Banda and parked in an attached garage. They also found over 3 kilograms of cocaine hidden in a shed on the property.

After the seizure, the Yakima Narcotics Unit attempted to obtain fingerprints from the packages containing the cocaine. A technician found partial fingerprints that were insufficient for identification.

However, the government did not provide Banda with the technician's report, or otherwise indicate any attempt was made to obtain fingerprints, until after the trial began. The district court denied Banda's motion for a continuance to obtain an expert analysis of the fingerprints.

During jury deliberations, the jury requested the court read a portion of Detective Kouba's testimony concerning the location of the Thunderbird on November 4. At the direction of the court, the court reporter read the jury extended portions of Kouba's testimony. Approximately 25 minutes later, the jury returned guilty verdicts. The court sentenced Banda to 193 months incarceration, to be followed by 5 years supervised release.

This appeal followed.

## DISCUSSION

### A. The Search Warrants

#### 1. Probable Cause

Banda contends Detective Kouba's affidavit fails to establish probable cause because (1) it

contains no information from which to assess the informant's reliability or veracity, and (2) the information was stale.

The affidavit sets forth the following facts:

1. The execution of a search warrant on November 4, 1992, at 4005 West Walnut, resulted in the seizure of one-quarter ounce of cocaine and the arrest of Antonio Galvan.

2. Galvan agreed to cooperate with the Yakima Narcotics Unit in return for leniency.

3. Galvan placed a phone call to the source of his cocaine. Galvan received a call at 11:20 a.m. from a woman named Anna who stated she was in Moxee, Washington, weighing out the cocaine, and would arrive in one-half hour.

4. Manuel and Anita Farias were arrested at 11:55 after arriving with a quarter kilo of cocaine. Anita Farias agreed to cooperate in exchange for leniency.

5. Detective Gary Kouba accompanied Ms. Farias to Moxee.

6. Ms. Farias claimed she and her husband obtained the cocaine from Jose Banda. Farias stated she and her husband met Banda at 550 Chappel Road, and Banda followed them to the parking lot of Albertson's, where Banda provided them with the cocaine.

7. Farias stated Banda lived at 550 Chappel Road. She also stated 550 Chappel Road was her former residence. Her vehicle was registered at 550 Chappel Road on October 16, 1992.

8. Farias stated she saw multiple kilograms of cocaine delivered to 550 Chappel Road.

9. Officers observed a vehicle registered to Banda parked at 550 Chappel Road.

The affidavit reveals nothing about the veracity or reliability of the informant, Anita Farias, or her husband, Manuel. However, the affidavit reveals an investigation corroborating several details in Anita Farias' statements. She stated she previously resided at 550 Chappel Road, and, as noted in the affidavit, her vehicle registration corroborated this fact. She also stated Banda resided at 550 Chappel Road, which was corroborated by other information in the affidavit that Banda's vehicle was registered to that address and was parked there. Because information obtained in the investigation, and set forth in the affidavit, corroborated details of Anita Farias' statements, the lack of evidence demonstrating her veracity is not critical. Illinois v.

Gates, 462 U.S. 213, 233-35 (1983); United States v. Angulo-Lopez, 791 F.2d 1394 1397 (9th Cir. 1986); United States v. Roberts, 747 F.2d 537, 543 (9th Cir. 1984).

Furthermore, the affidavit contains information demonstrating the basis for Anita Farias' knowledge. The affidavit discloses that she personally saw multiple kilograms of cocaine being delivered to the premises at 550 Chappel Road nineteen days before the application for the search warrant. In addition, she and Manuel Farias received cocaine from Banda on the date of the application for the warrant.

We conclude that, under the totality of the circumstances, the magistrate's finding of probable cause is supported by substantial evidence.

2. Staleness of Information.

Banda argues the affidavit is deficient because it contains no evidence that cocaine was on the premises at 550 Chappel Road on November 4, 1992, the date the warrant was obtained and executed. He

also points out the affidavit merely discloses that Anita Farias saw kilograms of cocaine being delivered to the premises nineteen days earlier; there is no assertion in the affidavit that controlled substances were stored on the premises at 550 Chappel Road.

We reject this argument. "The mere lapse of substantial amounts of time is not controlling in a question of staleness." United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993) (quoting United States v. Dozier, 844 F.2d 701, 707 (9th Cir.), cert. denied, 488 U.S. 927 (1988)). We evaluate staleness "in light of the particular facts of the case and the nature of the criminal activity and property sought." United States v. Greany, 929 F.2d 523, 525 (9th Cir. 1991). "With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity." Pitts, 6 F.3d at 1369 (internal quotations omitted).

The affidavit disclosed evidence of drug trafficking at the Chappel Road premises. The affidavit contains information from Anita Farias that

she and her husband ordered 9 ounces of cocaine from Banda, met him at the Chappel Road residence, and that he delivered cocaine to them in the Albertson's parking lot, all on the same day Banda was arrested, November 4, 1992. From this evidence, and from the evidence Banda lived at the Chappel Road residence, a magistrate could reasonably conclude illicit drugs would likely be found there on November 4, 1992. See id. ("In the Ninth Circuit, we have recognized that [i]n the case of drug dealers, evidence is likely to be found where the dealers live.") (internal quotations omitted).

3. Overbreadth.

a. The November 4, 1992 Search Warrant.

The affidavit in support of the November 4, 1992 search warrant indicated that at 550 Chappel Road were a residence, a mobile home, several wood sheds, a satellite dish, a small orchard with approximately twenty trees, and a detached garage. The affidavit also stated Band's car was parked in the driveway.

The November 4, 1992 warrant authorized a search of all buildings and outbuildings at 550 Chappel Road, and all "property real or personal situated on said described property." The warrant also included an order to seize any property used in the illegal manufacture, sale, distribution, or disposal of drugs, and personal property tending to show dominion and control of such drugs.

A "warrant's description of items [to be seized] . . . need only be reasonably specific, rather than elaborately detailed." United States v. Rodriguez, 869 F.2d 479, 486 (9th Cir. 1989) (internal quotations omitted). Considering the portability of controlled substances, and the many locations on the property where drugs could be hidden, the warrant issued November 4, 1992, was not overly broad.

b. The November 5, 1992 Search Warrant.

The affidavit in support of the November 5, 1992 search warrant recites the same facts contained in the November 4 affidavit. In addition, the November 5 affidavit recounts the successes of the

November 4 search. Specifically, the November 5 affidavit states the government found one ounce of cocaine in a bedroom, over $13,000 in cash, a loaded handgun, and, "[l]ocated outside the residence, hidden under and in two abandoned sheds on the property, was approximately two (2) pounds of marijuana, over 900 grams of cocaine, some of which was repackaged for sale and two triple beam gram scales."

The November 5 affidavit also indicated the information provided by Anita Farias for the November 4 search was accurate, and she believed more cocaine was "buried somewhere to the west of the residence." The affidavit also disclosed Anita Farias said she "overheard statements by Jose Banda" that Banda had purchased a plastic barrel to act as a storage container for multi kilograms of cocaine and cash, and had buried this barrel in the area behind the residence at 550 Chappel Road. The affidavit noted several areas of fresh dirt were visible on the

property, although darkness forced the government to abandon the November 4 search.

Although the warrant issued November 5, 1992 is broad enough to cover what was searched, Banda contends the officers, by the language of the affidavit in support of the warrant, sought to limit the scope of the search to items buried underground. We disagree. The affidavit states, "[d]ue to darkness and weather conditions officers were unable to make a complete search of the property which would include checking the area beneath areas which show recent signs of digging."

The plain language in the affidavit in support of the November 5 search warrant indicates the officers wanted to search all of the property not searched the previous day, including portions of the property where items might be buried. Additionally, the affidavit indicated cocaine was found in the home itself. When contraband is found in a house, search of a garage on the premises may be authorized. United States v. Whitten, 706 F. 2d 1000, 1008-09 (9th

Cir. 1983), cert. denied, 465 U.S. 1100 (1984). The warrant issued November 5, 1992 was not overly broad, nor limited, as Banda argues, by the affidavit furnished in support of it.

B. The Witness Testimony Read to the Jury.

During deliberations, the jury sent the court a note asking whether the Thunderbird automobile was in the garage at the Chappel Road residence on November 4. Detective Kouba had testified the Thunderbird was in the garage on November 5.

The court conferred with both defense and prosecution counsel, solicited their advice as to how to respond to the jury's inquiry, and then had extensive portions of Kouba's testimony read to the jury.

Banda argues the court abused its discretion by having this testimony read, because it emphasized Kouba's testimony instead of simply responding to the jury's specific question. Banda contends the seriousness of this error is reflected by the fact that

the jury returned its verdict 25 minutes after Kouba's testimony was read to them.

The district court did not abuse its discretion by having Kouba's testimony read. The court sought to avoid undue emphasis on any single portion of the testimony by having extensive portions of it read, both on direct and cross-examination. See United States v. Nickell, 883 F.2d 824, 829 (9th Cir. 1989). Moreover, the court instructed the jury, both before and after the testimony was read, not to place undue emphasis on it, and to consider Kouba's testimony only in combination with all other evidence presented during the trial. See United States v. Sandoval, 990 F.2d 481, 487 (9th Cir.), cert. denied, 114 S. Ct. 218 (1993).

The circumstance that the jury returned its verdict 25 minutes after Kouba's testimony was read does not suggest, as Banda argues, that the jury placed undue emphasis on it. In United States v. King, 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), the defendant also argued the speed with

which the jury reached its verdict after having testimony read during deliberations attested to placing undue emphasis on the testimony. We rejected that argument in King, stating,

> We think that other conclusions not inconsistent with careful consideration of the evidence as a whole are possible. The jury may have already reached a verdict and merely desired a confirming clarification on one point; the clarification on a point may have been the "straw that broke the camel's back" in swaying a verdict properly based on the totality of the evidence. Id. at 850.

A court's decision to read portions of testimony to the jury lies within its sound discretion. Nickell, 883 F.2d at 829. The district court did not abuse that discretion.

C. The Fingerprint Tests

Banda argues the state's delay in revealing the existence of fingerprint tests on the cocaine packages violated his right to disclosure of exculpatory materials under Brady v. Maryland, 373 U.S. 83 (1963). Brady proscribes prosecutorial suppression of exculpatory evidence that is "material" to either guilt or punishment. Brady, 373 U.S. at 87. The

government's information need not be disclosed prior to trial, however, so long as the defense receives the information "at a time when the disclosure would be of value to the accused." United States v. Davenport, 753 F.2d 1460, 1462 (9th Cir. 1985).

Here, the government disclosed the fingerprint evidence during trial. The court then invited defense counsel to contact the technician who conducted the initial tests and determine the need to produce her as a witness. Banda thus was afforded adequate opportunity to make effective use of the government's information regarding the fingerprint tests. There was no Brady violation. See United States v. Gordon, 844 F. 2d 1397, 1403 (9th Cir. 1988).

D. Denial of New Trial Motion--Narcotics Involving Minor.

We review the denial of a motion for a new trial for abuse of discretion. United States v. George, 960 F.2d 97, 101 (9th Cir. 1992).

Banda argues the trial court erred in failing to grant his motion for a new trial because the jury

heard allegations that he conspired with a minor to possess cocaine with the intent to distribute and that he used or employed the minor in a narcotics transaction. Although the government charged Banda with such crimes, the district court dismissed these counts for lack of evidence at the close of the government's case-in-chief. Banda contends the allegations were prejudicial and resulted in the denial of a fair trial. We disagree.

In ruling on Banda's motion for a new trial, the court found that although jurors might have "strong negative feelings toward illegal narcotics and those who distribute them," and such feelings could become exacerbated upon learning a distributor of controlled substances utilized a minor in connection with the distributions,

> it does not necessarily follow that a defendant who is tried by jurors with such feelings necessarily suffers prejudice. To ensure that defendants in drug cases receive fair trials free from juror prejudice resulting from personal feelings about narcotics, the court, while conducting voir dire, makes certain that each juror is able to set aside any personal feelings he or she may have about narcotics and decide the case on the evidence presented.

The district court's analysis is sound. The voir dire process was sufficient to dispel the concerns Banda asserts, see Patton v. Young, 467 U.S. 1025, 1038 n.13 (1984); United States v. Steel, 759 F.2d 706, 711 (9th Cir. 1985), and Banda does not challenge that process. The district court did not abuse its discretion in denying Banda's motion for a new trial.

E. Sufficiency of the Evidence.

Evidence at trial is sufficient to support a conviction if, viewing the evidence in the light most favorable to the prosecution, "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Mason, 902 F.2d 1434, 1441 (9th Cir. 1990) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

1. Possession of a Firearm in Relation to a Drug Crime.

Banda contends the government presented insufficient evidence to conclude the loaded handgun found in his residence was used or carried during a drug trafficking offense, and his sentence

enhancement under 18 U.S.C. § 924(c)(1) therefore must be reversed.

To convict a defendant under 18 U.S.C. § 924(c)(1), the government must prove a firearm played some role in the underlying crime, and that the defendant used or carried the firearm. United States v. Torres-Medina, 935 F.2d 1047, 1048-49 (9th Cir. 1991). "When a firearm serves to protect the defendants or their drugs or to intimidate others, the firearm is said to have a role in the crime." United States v. Torres-Rodriguez, 930 F.2d 1375, 1385 (9th Cir. 1991).

In Torres-Rodriguez, government agents found a loaded pistol in the defendant's bedroom, between the mattress and spring of the bed, and heroin, drug paraphernalia, and cash in other rooms of the house. Id. We concluded the jury could infer from this evidence the defendant possessed the handgun to protect the contraband located on the premises. Id. See also United States v. Stewart, 779 F. 2d 538, 539-40 (9th Cir. 1985) (Kennedy, J.) (jury

reasonably could find gun discovered in trunk of car parked in front of house containing drugs protected drug operations).

In the present case, the officers searching the premises at 550 Chappel Road discovered over $14,000 in cash, over 13 kilograms of cocaine, one kilogram of marijuana, and other evidence of drug trafficking. The gun was loaded and was found under a seat cushion of a love seat in Banda's living room. This evidence was sufficient for the jury to find the gun "was strategically located so as to be quickly and easily available" during a drug transaction. United States v. Guy, 903 F.2d 1240, 1243 (9th Cir. 1990) (internal quotations omitted). See United States v. Martinez, 967 F.2d 1343, 1346 (9th Cir. 1992); Torres-Medina, 935 F.2d at 1050. The evidence was sufficient to support Banda's conviction and sentence enhancement under 18 U.S.C. § 924(c)(1).

2. Possession of Marijuana with Intent to Distribute.

Banda contends the 2.2 pounds of marijuana discovered on his property is not inconsistent with personal use, and the evidence is insufficient to establish an intent to distribute. We disagree.

A jury reasonably could conclude 2.2 pounds of marijuana is more than a person would posses for personal use. United States v. Glenn, 667 F.2d 1269, 1272 (9th Cir. 1982) (185 grams of marijuana considerably more than associated with personal use). See also Martinez, 967 F. 2d at 1345-46. Furthermore, the government presented evidence that it found a triple beam scale, a telephone pager, a loaded weapon and $14,780 in cash at the Chappel Road premises. The 2.2 pounds of marijuana, in conjunction with the other evidence of drug trafficking, are sufficient to demonstrate Banda intended to distribute the marijuana. See United States v. Innie, 7 F.3d 840, 844 (9th Cir.), cert. denied, 114 S. Ct. 1567 (1994); Martinez, 967 F.2d at 1345-46

AFFIRMED.